

1 Q Did you maintain a list in your office or
2 anywhere, your own list of buildings with respect to which
3 there was a pending application?

4 A No, I did not. Until we began to reconstruct and
5 I created this reconciliation list for a period.

6 MR. SPITZER: I have nothing further, Your Honor.

7 MR. HOLT: I have just a couple of brief follow
8 up.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. HOLT:

11 Q Mr. Price, I'm curious to know why was there no
12 mention of the policy that you've spoken of in the surreply?

13 A Ah -- I -- I frankly don't know. I didn't draft
14 the surreply and I don't know how it would fit into the
15 context of the surreply.

16 Q There's no reference in the surreply is there to
17 the compliance policy that you say you established with
18 Mr. McKinnon?

19 A I'd have to read it over to validate that. I
20 can't answer your question.

21 Q Can we take a moment to look at it?

22 A Are you talking about the compliance policy that
23 we put in, in 1995, in May of '95 or the summer or spring of
24 '95 or what I considered the procedure that people should
25 follow in the company for applying and tracking FCC

1 licenses?

2 Q No, I was referring to the policy that you spoke
3 about that you said was established around 1991.

4 A Right.

5 Q Which you say was something different from the
6 pattern of practice that you referred to in this.

7 A Okay. I'm not saying it was different than the
8 pattern of practice. I think the question that came up was
9 did it turn out that the pattern and practice turned out to
10 be different than the policy and that was true. Was the
11 pattern and practice always different from the policy? No,
12 I don't believe so. You were just intimating that the
13 pattern and practice was not the policy. I think hopefully
14 to a large degree we did it right. In some cases, it turned
15 out we did it wrong unfortunately. I think you're implying
16 to put something into place and then the pattern and
17 practice was different than the policy. The policy was to
18 go get FCC licenses and make sure we had them before we
19 provided service. Now, you were asking why that memo from
20 '91 is not referenced in the surreply.

21 Q Other than the statement that it's been Liberty's
22 pattern and practice or way to grant pending application STA
23 prior to making a microwave path operational, there's no
24 discussion of compliance procedures. I'm curious to know
25 why.

1 A I don't recall why it was drafted this way --

2 JUDGE SIPPEL: This is a piece of litigation. I
3 mean, this is a litigation document that was prepared by
4 counsel who's presumably got the strategy and tactics and
5 everything. I mean, why he didn't go into some of the
6 subject matter is really not relevant to this particular
7 document.

8 MR. HOLT: Okay.

9 JUDGE SIPPEL: Do you have anything to ask the
10 witness on the document's accuracy that he attested to?
11 Otherwise, let's move onto something else.

12 MR. HOLT: I'll move onto another question, Your
13 Honor.

14 BY MR. HOLT:

15 Q Mr. Price, you testified that on occasion Liberty
16 commenced service after the time period, the 120 day time
17 period specified in the contract?

18 A That's correct.

19 Q On those occasions, has there been any penalty
20 imposed on Liberty or -- in terms of the voucher?

21 A Very often a building would ask for some period of
22 adjustment or some token contribution to the lateness, a
23 free month of service or a premium channel or something to
24 make good for the fact that the residents were disappointed.
25 Sometimes. Sometimes not. Sometimes timeliness was not an

1 issue and they didn't care. In some cases they sent out a
2 letter to the residents and they made a promise and they
3 felt the board was embarrassed and we should do something to
4 make up for that.

5 Q So is it fair to say that you didn't view that
6 clause that Mr. Spitzer referred to in the contract as being
7 a material term that will require Liberty to move quickly or
8 else face some sort of penalty?

9 MR. SPITZER: Objection, Your Honor, as to the
10 legal nature of the conclusion that he's asking for.

11 MR. HOLT: Well --

12 JUDGE SIPPEL: Let me see if the witness can
13 understand. This witness graduated from a foreign law
14 school.

15 THE WITNESS: It was grounds for cancellation of
16 the contract. So therefore, it was a material term.

17 BY MR. HOLT:

18 Q Did you have an opportunity to cure, do you know,
19 a clause in the contract that would provide you an
20 opportunity to cure?

21 A I force majeure. I mean, it wasn't our fault.
22 Often those things happen. You know, we had work in the
23 building and we were held up for two months because they
24 were fixing the roof and we couldn't get up there. Not our
25 fault. It's an example. Not unusual in New York buildings.

1 The elevator was broken, couldn't use the service elevator
2 for three weeks because they were doing, you know, someone
3 was renovating their apartment.

4 Q So I guess the point of my question is this. Did
5 you view that clause as being a provision that required
6 Liberty to act quickly to install and activate service? Or
7 did you view it as something that if Liberty didn't comply
8 with it, it wasn't going to be any sort of significant
9 penalty?

10 A Because of material term number one. So we take
11 all material terms seriously because we don't like people
12 canceling agreements it takes us a long time to negotiate.
13 Was it our experience that most buildings were highly
14 sensitive to demanding service on the day it was guaranteed?
15 No, that was not our experience.

16 MR. HOLT: I have nothing further of the witness,
17 Your Honor.

18 JUDGE SIPPEL: Mr. Weber.

19 MR. WEBER: No, no redirect -- recross.

20 JUDGE SIPPEL: Let me clarify something. I want
21 to get something clarified at least in my mind. If I heard
22 your testimony with respect to Mr. Spitzer's redirect, you
23 made a -- I just want to refer you to your answers to
24 Mr. Spitzer. Do you recall what those were?

25 THE WITNESS: Yes, sir.

1 JUDGE SIPPEL: And this has to do again with this
2 one sentence here on the surreply, Tab 18. And my question
3 to you is at the time that the surreply was submitted to the
4 Commission, I take it this was not an accurate, this was an
5 erroneous statement that it had been Liberty's pattern and
6 practice to await a grant.

7 THE WITNESS: I didn't, it may be erroneous, Your
8 Honor, but I didn't take it to be erroneous.

9 JUDGE SIPPEL: I didn't ask that question. I
10 mean, I'm not trying to trick you on it. I'm just saying
11 that reading this now you can see that that was an erroneous
12 statement.

13 THE WITNESS: I think it would better read had
14 been Liberty's pattern and practice to wait might better
15 express the thought, but the intent there, my reading of it,
16 the intent was to say during the course of our business it
17 was the practice I laid down or what I expected was that and
18 it turns out it wasn't followed at a point in time I
19 learned.

20 JUDGE SIPPEL: All right. I'm not trying to
21 argue --

22 THE WITNESS: This could be read the other way,
23 yes sir.

24 JUDGE SIPPEL: Pattern and practice to me is a
25 historical event. It is not something that this is what you

1 should do or this is what you should have done.

2 THE WITNESS: Yes, sir.

3 JUDGE SIPPEL: Pattern and practice. I'm
4 accepting your answer saying that, yes, looking at it now in
5 hindsight that sentence was not accurate. It was not an
6 accurate representation to the Commission of what had
7 happened.

8 THE WITNESS: I think it could be better phrased
9 had been Liberty's practice. I think it's confusing the way
10 it's stated. But even when I read it and read over these
11 documents, I didn't take that to be, it didn't leap out to
12 me as a discrepancy.

13 JUDGE SIPPEL: I am not -- all right. You've
14 qualified your answer. To the extent that you qualified it,
15 so be it. But let me ask this question. Was there a time
16 after May 17th, 1995 that the Commission was fully informed
17 with respect to Liberty's actual pattern and practice during
18 that time period? In other words, was this sentence later,
19 the information conveyed to the Commission in that sentence,
20 was that information corrected at a later time?

21 THE WITNESS: I believe it was, yes sir.

22 JUDGE SIPPEL: And what would your belief be with
23 respect to the way that was done?

24 THE WITNESS: I recall there were four more paths
25 that we discovered in the course of looking into things. I

1 believe it was at this juncture that we added to the list of
2 those that were being served that we were not aware had been
3 activated prematurely.

4 JUDGE SIPPEL: That's not answering my question.
5 This again, it goes back to this is very, this question,
6 this statement locks Liberty in. Liberty says to the
7 Commission, our pattern and practice has been to await a
8 grant. It turned out later and you testified on redirect,
9 but that turned out later not to be the case.

10 THE WITNESS: That's correct.

11 JUDGE SIPPEL: My question is was it reported to
12 the Commission that that was not the case?

13 THE WITNESS: I believe we -- I was assuming, Your
14 Honor, that our reporting to the Commission of the paths
15 Time Warner had reported to unauthorized operations, I
16 believe that our acknowledgement of that and the adding to
17 that on our motion of additional paths we discovered was
18 responding to that saying that I thought, we thought we were
19 complying with the procedure, but in fact we weren't and
20 here are some gross examples of it.

21 JUDGE SIPPEL: All right.

22 THE WITNESS: I wasn't intending to say were that
23 what I, what we just said wasn't true at all, that we didn't
24 overlook anything and we were perfectly okay even though we
25 came to the Commission and said we're not perfectly okay.

1 We have these problems. I wasn't intending to rewrite the
2 record and say we had no problems when it turned out we had
3 problems.

4 JUDGE SIPPEL: No, but my question is more to the
5 effect that does there come a point where you acknowledged
6 to the Commission that, no, in fact our pattern and our
7 practices at least had not been as represented here to await
8 a grant. In fact, there were practices when in fact we had
9 not awaited a grant.

10 THE WITNESS: I believe we enumerated those in one
11 of the letters to the FCC at this time and enumerated each
12 path which we had been serving unauthorized.

13 JUDGE SIPPEL: Did you want to clarify that any
14 further, Mr. Spitzer, or have I --

15 MR. SPITZER: Only with one question, Your Honor.

16 FURTHER RECROSS EXAMINATION

17 BY MR. SPITZER:

18 Q Mr. Price, I'd merely ask whether you referred
19 just moments ago in your answer to the Judge to certain
20 correspondence or answers that were given to the Commission,
21 elucidations upon the sentence in Time Warner 18 whether,
22 whether Liberty Exhibit 3 constitutes one of those. Is that
23 your June 16 letter?

24 A Yes, it does.

25 Q And then would the -- also incorporating the

1 attachments that it referred to in that letter, is that
2 correct?

3 A That's correct.

4 MR. SPITZER: I have nothing further.

5 JUDGE SIPPEL: That's all I have. We're completed
6 with the testimony absent some determination from billing
7 records that there's more to ask of this witness. Let's go
8 off the record and see what we can do.

9 (Whereupon, a brief recess was taken.)

10 JUDGE SIPPEL: We are in recess until five minutes
11 after 2:00. Thank you.

12 (Whereupon, a brief recess was taken.)

13 JUDGE SIPPEL: Back on the record. Good
14 afternoon.

15 ALL: Good afternoon.

16 JUDGE SIPPEL: Let's go right on the record. Do
17 we have any further questions of the witness Mr. Price?

18 MR. BECKNER: Your Honor, I don't. I've reviewed
19 the billing records and I don't really see a use for them in
20 examining Mr. Price. I will be using them to examine
21 Mr. Barr, but Mr. Price can go as far as I'm concerned.

22 JUDGE SIPPEL: All right. Mr. Weber, the Bureau
23 feel that way too?

24 MR. WEBER: We have no further questions of
25 Mr. Price.

1 JUDGE SIPPEL: All right. Mr. Price is released.
2 You can so instruct him with the caution about the
3 sequestration.

4 (Witness exits.)

5 JUDGE SIPPEL: Is there any further business that
6 we need to conduct?

7 MR. BECKNER: Well, I, in the lunch break in
8 response to Your Honor's suggestion, my associate called
9 back and asked for folks to make copies of Bruce McKinnon's
10 deposition transcript. So I got a bunch of copies of that.
11 And if it's all right with you, I'd like to go out and have
12 the Reporter mark that. And we can get that --

13 JUDGE SIPPEL: And that will be your next exhibit
14 which would be? That would be --

15 MR. BECKNER: 41.

16 JUDGE SIPPEL: 41 is correct according to my
17 count. You want to bring those up to the Reporter --

18 MR. BECKNER: Yes.

19 JUDGE SIPPEL: -- and we can do that right now?

20 MR. BECKNER: Your Honor, I have some extras.
21 Hopefully, they'll keep everyone supplied.

22 JUDGE SIPPEL: Two copies, and he's to stamp those
23 and then mark them for identification as TW/CV Exhibit 41
24 for identification. Do you have an extra one for me?

25 //

1 (The document referred to was
2 marked for identification as
3 TW/CV Exhibit No. 41.)

4 MR. BECKNER: Yes, I do, Your Honor. I have an
5 extra one.

6 JUDGE SIPPEL: Thank you, very much. What the
7 Reporter is marking for identification as your Exhibit 41,
8 the deposition transcript of Mr. Bruce McKinnon that was
9 taken on June 5, 1996. There was no objection noticed this
10 morning, noted this morning for its receipt into evidence.
11 So there being no objection, your motion is granted,
12 Mr. Beckner. And your Exhibit 41 for identification is
13 received in evidence at this time.

14 (The document previously
15 marked for identification as
16 Exhibit 41 was received in
17 evidence.)

18 MR. BECKNER: Okay. And, Your Honor, as I've
19 mentioned just a moment ago, I would propose next week to
20 offer either some or all of these Pepper & Corazzini billing
21 records at the time that Mr. Barr testifies.

22 JUDGE SIPPEL: That's fine.

23 MR. BECKNER: And I'll have copies made.

24 MR. SPITZER: We'll have no objection, Your Honor.

25 JUDGE SIPPEL: Thank you, Mr. Spitzer. And I

1 understand also that Mr. Holt who was excused from this
2 afternoon's session will have a document also at that time.

3 MR. BECKNER: Yes. I don't know what it is that
4 he has, but that's right. And I'll make sure that he
5 receives a copy of Mr. McKinnon's transcript so that he's up
6 to speed on the fact that it's admitted into the record.

7 JUDGE SIPPEL: Fine. If we have nothing else,
8 Mr. Weber, do you have anything more on behalf of the
9 Bureau?

10 MR. WEBER: No, Your Honor.

11 JUDGE SIPPEL: Then --

12 MR. BECKNER: Oh, Your Honor, I'm sorry. There
13 was one other thing that I wanted to ask about. And this
14 is -- as you know, I've been trying to figure out when
15 Mr. Price may have been aware of the petitions to deny and
16 the significance of the petitions to deny with respect to
17 Liberty's application. And as you recall when I examined
18 him earlier today I asked about one of Mr. Barr's time
19 entries and the bills that we received this morning for
20 January 11th, '95 which appears to reflect a telephone call.
21 The time entry also reflects a memo to Peter Price re the
22 same. And I've looked and Ms. McGuire has independently
23 looked at the privileged document log and you don't see any
24 such memo identified on the privileged document log. And,
25 of course, we're not aware of any such memo having been

1 produced. And I'd like just to ask, and I will ask
2 Mr. Barr, providing he's available to us, what I'd like to
3 ask is to see whether or not a second memo exists as
4 reference to Mr. Barr's comments.

5 MR. SPITZER: Obviously, we'll check that. I just
6 observe one thing. It says memo to Peter Price re same
7 referring to the Time Warner petitions. There are entries
8 on subsequent dates on the privilege log. It doesn't say
9 necessarily it was sent on that date. But obviously, we'll
10 look.

11 JUDGE SIPPEL: Thank you.

12 MR. BECKNER: As I say, if we can identify if this
13 memo exists, then I might ask in view of the importance of
14 this issue --

15 JUDGE SIPPEL: Sure.

16 MR. BECKNER: Whether or not in fact the memo
17 could be produced or attorney/client material could be
18 redacted or maybe it isn't in fact attorney/client. I'd
19 like to go into that if the document's found.

20 JUDGE SIPPEL: Well, we'll wait and find out what
21 it's all about and come back on Monday. We might have some
22 clean up things to do Monday morning then. So the witness
23 can come in at 10:00 o'clock. There's this question of
24 getting somebody out of town.

25 MR. SPITZER: Just two very small cleanup issues,

1 Your Honor. You had raised the issue of the minutes of
2 Liberty and we have checked with Mr. Milstein, Howard
3 Milstein, and his recollection as ours is that there really
4 has not been a board meeting which would produce formal
5 minutes. We will again go back to the actual documentation
6 which was, would reflect the creation of the company in any
7 corporate minutes that might exist.

8 But again, we just want the Court to know that it
9 is our understanding that there will not be the sort of
10 minutes you would expect Time Warner or a larger entity to
11 just publicly control for instance. Secondly, we are
12 getting and will get Mr. Barr's desk calendar within the
13 relevant timeframe. And we're not able to speak to Mr.
14 Lehmkuhl, but we will pursue that same issue with him.

15 JUDGE SIPPEL: Okay. I think that's the only
16 matters that we had outstanding, is that correct? So we'll
17 have the minutes and we have Mr. Holt's document to deal
18 with, possibly the desk calendar. Now, you'll get copies of
19 those to the other side as soon as you can get them, is that
20 right?

21 MR. SPITZER: That's correct, Your Honor.

22 JUDGE SIPPEL: Because preparation's important on
23 this. I guess that's all then we have for this afternoon.
24 We are -- it's 2:15 and we are in recess until 9:30 on
25 Monday, January the 27th. Thank you.

1 ALL: Thank you, Your Honor.

2 (Whereupon, at 2:15 p.m. the hearing was
3 adjourned, to resume at 9:30, Monday, January the 27th,
4 1997.)

5 //

6 //

7 //

8 //

9 //

10 //

11 //

12 //

13 //

14 //

15 //

16 //

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 //

REPORTER'S CERTIFICATE

FCC DOCKET NO.: 96-41


CASE TITLE: Liberty Cable, Inc.

HEARING DATE: January 21, 1997

LOCATION: Washington, D. C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date: 01/21/97

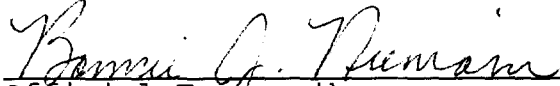

Official Reporter
Heritage Reporting Corporation
1220 "L" Street, N.W.
Washington, D.C. 20005

Gary A. Sabel

TRANSCRIBER'S CERTIFICATE

I hereby certify that the proceedings and evidence were fully and accurately transcribed from the tapes and notes provided by the above named reporter in the above case before the Federal Communications Commission.

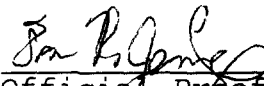
Date: 01/22/97


Official Transcriber
Heritage Reporting Corporation
Bonnie J. Niemann

PROOFREADER'S CERTIFICATE

I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission was proofread on the date specified below.

Date: 01/22/97


Official Proofreader
Heritage Reporting Corporation
Don R. Jennings